

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Judiciary Committee

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BILL: SB 2064

INTRODUCER: Senator Altman

SUBJECT: Construction Defects

DATE: April 20, 2009

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harrington</u>	<u>Rhea</u>	<u>RI</u>	<b>Favorable</b>
2.	<u>Sumner</u>	<u>Maclure</u>	<u>JU</u>	<b>Favorable</b>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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**I. Summary:**

The bill provides uniform use of terms, defines new terms, and provides clarification for when the provisions of the construction defects law apply to construction defect cases.

The bill defines “completion of a building or improvement” and amends the definition of “service.” The bill revises procedures for notice and opportunity to repair certain defects. The bill specifies that there are no construction lien rights for destructive testing under certain circumstances. The bill provides that the exchange of discoverable information between the claimant and person served with notice must occur within 30 days. The bill provides that the claimant and person served with notice may agree in writing to pre-action mediation at any time. The bill further provides that unless the parties agree, after October 1, 2009, all written contracts must contain a notice that any claims for defects are subject to the notice and cure provisions of the construction defects law.

This bill amends the following sections of the Florida Statutes: 558.002, 558.003, 558.004, and 558.005.

**II. Present Situation:**

The Legislature enacted ch. 558, F.S., in 2003 to provide an alternative dispute resolution process that would reduce the need for litigation.<sup>1</sup> Chapter 558, F.S., provides procedures that

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<sup>1</sup> Chapter 2003-49, L.O.F. The legislative finding with regard to this chapter provides that it is beneficial to have an alternative method to resolve construction disputes that would reduce the need for litigation while protecting the rights of homeowners. Section 558.001, F.S.

claimants must follow before initiating litigation regarding construction defects in an effort to reduce litigation while still protecting the rights of property owners. In short, it provides for notice and an opportunity to cure. That is, before the property owner may sue a contractor, the property owner is required to notify the contractor of the defect and give the contractor the opportunity to examine the defect. If the contractor agrees that the defect exists, the contractor is given a reasonable opportunity to repair the defect or make some other offer in settlement. If the parties still disagree, the matter may go to court. “In more practical terms, it is intended to allow both claimants and participants to design and construction to resolve alleged defects before both sides run to the courthouse and spend a pile of money on lawyers.”<sup>2</sup>

### Definitions

Section 558.002, F.S., provides definitions for terms related to causes of action involving construction defects. Among the terms included in this section are the following:

- “Claimant” is defined as a property owner, including a subsequent purchaser or association, who asserts a claim for damages against a contractor, subcontractor, supplier, or design professional concerning a construction defect or a subsequent owner who asserts a claim for indemnification for such damages. The term does not include a contractor, subcontractor, supplier, or design professional.
- “Construction defect” is a deficiency in, or a deficiency arising out of, the design, specifications, surveying, planning, supervision, observation of construction, or construction, repair, alteration, or remodeling of real property resulting from:
  - (a) Defective material, products, or components used in the construction or remodeling;
  - (b) A violation of the applicable codes in effect at the time of construction or remodeling which gives rise to a cause of action pursuant to s. 553.84, F.S.;
  - (c) A failure of the design of a dwelling to meet the applicable professional standards of care at the time of governmental approval; or
  - (d) A failure to construct or remodel a dwelling in accordance with accepted trade standards for good and workmanlike construction at the time of construction.
- “Service” means delivery by certified mail, return receipt requested, to the last known address of the addressee.

### Notice<sup>3</sup>

Before a cause of action can be initiated against a contractor, subcontractor, supplier, or design professional for an alleged construction defect, the claimant must serve written notice of the claim on the defendant and provide an opportunity to resolve the claim. The claimant must serve a notice of the claim within 15 days after discovering the alleged defect, but the failure to do so

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<sup>2</sup> Larry R. Leiby and Steven B. Lesser, *How to Comply with Chapter 558 Florida Statutes: Current Challenges and Future Changes*, The Florida Bar Journal (Feb. 2009).

<sup>3</sup> Section 558.004, F.S.

does not bar the filing of an action.<sup>4</sup> The notice must be served no later than 60 days prior to the filing of an action, or at least 120 days prior to the filing of an action involving an association representing more than 20 residential parcel owners. The notice must describe the claim in reasonable detail sufficient to determine the nature of each alleged construction defect, and it must include a description of the damage or loss resulting from the defect.

### **Opportunity to Repair<sup>5</sup>**

Within 30 days after receipt of the notice of claim, or 50 days for a notice of claim involving an association representing more than 20 residential parcels, the recipient is entitled to perform a reasonable inspection of the dwelling alleged to have a construction defect. A claimant must provide access to the dwelling during normal working hours such that the nature and cause of the defect as well as the extent to which repairs are needed to remedy the defect can be determined. If destructive testing is necessary to determine the nature and cause of the alleged defect, the recipient must notify the claimant in writing, describing specific aspects of the test. If a claimant promptly objects to the testing, the recipient must provide the claimant a list of three qualified persons from which the claimant may select one person to perform the testing. If a claimant fails or refuses to agree to destructive testing, the claimant has no claim for damages that could have been avoided or mitigated had the destructive testing been allowed when requested.

### **Forwarding a Copy of the Notice of Claim<sup>6</sup>**

Within 10 days after receipt of the notice of claim, or 30 days with a notice of claim involving an association representing more than 20 residential parcels, the recipient may forward a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional reasonably believed to be responsible for each defect, noting the specific defect for which each person is believed to be responsible. Such persons will be entitled to inspect the dwelling as provided for in s. 558.004(2), F.S.

### **Written Response to Copy of Notice of Claim<sup>7</sup>**

Within 15 days after receipt of the copy of the notice of claim, or 30 days with a copy of the notice of claim involving an association representing more than 20 residential parcels, the recipient must serve a written response to the person who forwarded the copy of the notice of claim. The response should indicate the findings and results of the inspection, a statement as to whether the recipient is willing to make repairs to remedy the alleged defect, and a timetable for when repairs will be completed.

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<sup>4</sup> If a claimant files an action alleging a construction defect without first serving the required notice, on timely motion by a party to the action the court shall abate the action, without prejudice, and the action may not proceed until the claimant has complied with the notice requirement and the procedures provided in ch. 558, F.S., that follow such notice. The action is abated without prejudice, however, meaning that if the claimant still wishes to pursue the action after complying with ch. 558, F.S., the action can be maintained. *See* s. 558.003, F.S.

<sup>5</sup> Section 558.004(2)(a)-(f), F.S.

<sup>6</sup> Section 558.004(3), F.S.

<sup>7</sup> Section 558.004(4), F.S.

### **Written Response to Claimant After Receipt of Initial Notice of Claim<sup>8</sup>**

Within 45 days after receiving notice of claim, or 75 days with a notice of claim involving an association representing more than 20 residential parcels, the recipient must serve a written response on the claimant that provides one of the following:

- A written offer to remedy the alleged construction defect at no cost to the claimant, a detailed description of the proposed repairs necessary to remedy the defect, and a timetable regarding completion;
- A written offer to compromise and settle the claim by monetary payment that will not obligate the person's insurer, and a timetable for making payments;
- A written offer to compromise and settle the claim by a combination of repairs and monetary payment in the manners stated above;
- A written statement that the person disputes the claim and will not remedy the defect or compromise and settle the claim; or
- A written statement that a monetary payment will be determined by the person's insurer within 30 days after simultaneous notification to the insurer and the claimant of this settlement option, which the claimant can accept or reject. If the insurer does not respond within the 30 days following notification, the claimant shall be deemed to have met all conditions precedent to commencing an action.

### **Claimant's Acceptance of an Offer<sup>9</sup>**

If a claimant accepts an offer to repair the alleged construction defect, the claimant shall provide the offeror and the offeror's agents reasonable access to the dwelling during normal working hours. If the offeror does not repair or make payment within the agreed time and manner, except for reasonable delays beyond the offeror's control, the claimant may proceed with an action against the offeror. If the offeror does make payment or repairs within the agreed time and manner, the claimant is barred from proceeding with a cause of action.

Any offer or failure to offer to remedy an alleged defect, or to compromise and settle the claim by monetary payment, does not constitute an admission of liability and is inadmissible in an action brought under ch. 558, F.S.<sup>10</sup>

### **Opt-in or Opt-out**

Sections 558.003 and 558.005(4) F.S., provide that the chapter applies to all construction defect litigation. However, s. 558.005(1)(a), F.S., provides that the provisions of ch. 558, F.S., control every contract for the design, construction, or remodeling of a dwelling entered into on or after July 1, 2004, and through September 30, 2006, that includes the following notice as part of the contract:

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<sup>8</sup> Section 558.004(5)(a)-(e), F.S.

<sup>9</sup> Section 558.004(8), F.S.

<sup>10</sup> Section 558.004(9), F.S.

CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT IN YOUR HOME. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE, REFERRING TO CHAPTER 558, OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.<sup>11</sup>

Section 558.005(1)(b), F.S., provides that the provisions of ch. 558, F.S., control every contract for the design, construction, or remodeling of a dwelling entered into on or after October 1, 2006, that includes the following notice as part of the contract:

CHAPTER 558, FLORIDA STATUTES, CONTAINS IMPORTANT REQUIREMENTS YOU MUST FOLLOW BEFORE YOU MAY BRING ANY LEGAL ACTION FOR AN ALLEGED CONSTRUCTION DEFECT. SIXTY DAYS BEFORE YOU BRING ANY LEGAL ACTION, YOU MUST DELIVER TO THE OTHER PARTY TO THIS CONTRACT A WRITTEN NOTICE, REFERRING TO CHAPTER 558, OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE SUCH PERSON THE OPPORTUNITY TO INSPECT THE ALLEGED CONSTRUCTION DEFECTS AND TO CONSIDER MAKING AN OFFER TO REPAIR OR PAY FOR THE ALLEGED CONSTRUCTION DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER WHICH MAY BE MADE. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER THIS FLORIDA LAW WHICH MUST BE MET AND FOLLOWED TO PROTECT YOUR INTERESTS.<sup>12</sup>

Section 558.005(4), F.S., provides that this chapter applies to all actions accruing on or after July 1, 2004, and all actions commenced on or after such date, regardless of the date of sale, issuance of a certificate of occupancy or its equivalent, or substantial completion of the dwelling. Further, this section provides that:

Notwithstanding the notice requirements of this section for contracts entered into between July 1, 2004, and September 30, 2006, this chapter applies to all actions accruing before July 1, 2004, but not yet commenced as of July 1, 2004, and *failure to include such notice requirements in a contract entered into prior to July 1, 2004, does not operate to bar the procedures of this chapter from applying to all such actions.*<sup>13</sup>  
(emphasis added)

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<sup>11</sup> Section 558.005(2)(a), F.S.

<sup>12</sup> Section 558.005(2)(b), F.S.

<sup>13</sup> Section 558.005(4), F.S.

This provision seems to be in conflict with s. 558.005(1), F.S., (discussed above) which requires the prescribed notice to be included in the contract for ch. 558, F.S., to apply. These provisions conflict and cause confusion on whether ch. 558, F.S., is an opt-in or opt-out procedure and whether notice is required.

### **Discovery of Defects**

Current law does not distinguish between defects discovered during the construction process and defects discovered after completion of the construction. It is common to discover defects during construction; indeed, it would be unusual for defects not to be discovered during the construction process. During construction, the contractor usually finds and quickly corrects defects. When the owner discovers a defect during construction, the owner can easily communicate with the contractor and has an easy remedy for the failure to correct such defects by withholding progress payments.

### **Destructive Testing**

Section 558.004(2), F.S., provides that the contractor is allowed to inspect an alleged construction defect prior to agreeing to assume responsibility for the defect. The parties may agree to destructive testing as part of that inspection.

### **Information Exchange**

Section 558.004(15), F.S., provides that any party may, during the ch. 558, F.S., process, request an exchange of all “discoverable evidence” relating to the claimed construction defects.

## **III. Effect of Proposed Changes:**

### **Definitions**

The bill adds the definition of “completion of a building or improvement.” Completion of a building or improvement means the issuance of a certificate of occupancy, or the equivalent, or where no certificate of occupancy or the equivalent authorization is issued, means substantial completion of construction, finishing, and equipping of the building or improvement.

The bill amends the definition of service to include service by hand delivery or by delivery by any courier with written evidence of delivery.

### **Substantial Completion**

The bill clarifies that the notice requirements in ch. 558, F.S., are not intended to interfere with an owner’s ability to complete the project that has not been substantially completed. The bill further clarifies that the notice requirements are not required for a project that has not reached the stage of completion of the building or improvement.

**Service**

The bill provides a uniform use of the term “service” and “served” throughout the chapter.

**Destructive Testing**

The bill provides that the notice of proposed destructive testing must include anticipated damage and repairs to or restoration of the property resulting from the testing.

The bill provides that there are no construction lien rights under part I of ch. 713, F.S., for the destructive testing caused by a person served with notice of an action alleging a construction defect or for restoring the area destructively tested to the condition existing prior to testing, except to the extent the owner contracts for the destructive testing or restoration.

**Notice**

The bill provides that when the contractor forwards a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional whom the contractor reasonably believes is responsible for each defect, the act of forwarding the notice may not be construed as an admission of any kind.

**Exchange of Information**

The bill amends the term “discoverable evidence” and provides that any person served with notice shall exchange, within 30 days, any design plans, specifications, and as-built plans; any documents detailing the design drawings or specifications; photographs, videos, and expert reports that describe the defect upon which the claim is made; subcontracts; and purchase orders for work that is claimed defective or any part of such materials.

The bill provides that the written request must include an offer to pay the reasonable costs of reproduction.

**Opt-out**

The bill clarifies that ch. 558, F.S., applies to all claims for legal relief for which the agreement to make the improvement was made after October 1, 2009, unless the claimant and potential defendant have agreed in writing to opt out of the requirements.

The bill provides that unless the parties agree that this chapter does not apply, any written contract for improvement of real property entered into between an owner and a contractor must contain substantially the following notice: “ANY CLAIMS FOR CONSTRUCTION DEFECTS ARE SUBJECT TO THE NOTICE AND CURE PROVISIONS OF CHAPTER 558, FLORIDA STATUTES.”

The bill provides that the failure to include the above notice in the contract does not subject the contracting owner, contractor, or design professional to any penalty.

The bill provides that the purpose of the notice is to promote awareness of the procedure.

### **Mediation**

The bill provides that mediation may be conducted at any time. The bill provides that subcontractors, suppliers, and others who receive notice from the general contractor may participate in mediation. The bill provides that the parties may agree to mediation in the contract or at any time thereafter.

### **Effective Date**

The bill provides an effective date of October 1, 2009.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

None.

### **C. Trust Funds Restrictions:**

None.

## **V. Fiscal Impact Statement:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

The bill clarifies that the provisions of ch. 558, F.S., apply to all contracts unless the parties have agreed otherwise. This might consequently expand the number of persons who will choose to comply with the notice provisions before bringing a legal action.

### **C. Government Sector Impact:**

The bill may reduce civil suits in the court system related to construction defects.

## **VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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